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Reopening of Criminal Proceedings in Romania in Case of a Trial in Absentia

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ABSTRACT: The reopening of the criminal trial in Romania in the case of trial in absentia of the convicted person is an extraordinary remedy of retrial whereby a final judgment of conviction will be retried if the person definitively convicted was not summoned to the trial and did not otherwise have official knowledge of it, thereby guaranteeing the right to a fair trial and, in particular, the exercise of the right of defence in a new trial cycle, which implies the possibility to be heard, to cross-examine witnesses or parties to the proceedings and to produce evidence in his defence, both as to the facts and the circumstances. If the retrial confirms the factual situation and the guilt of the defendant in the first trial cycle, when he was convicted in absentia, his request can be admitted only with regard to the individualisation of the sentence (if there are mitigating circumstances), with the consequence of pronouncing a new judgment than the one previously established.

KEYWORDS: trial in absentia, conviction, reopening of criminal proceedings, extraordinary remedy, appeal in the interest of the law

Short history

The regulation of the institution of reopening of criminal proceedings in the case of trial in the absence of the convicted person has a historical tradition in Romania, in the sense that it was regulated for the first time in the Code of Criminal Procedure of 1864 (in force from 2nd December, 1864 to 18th March, 1936), which stated in the provisions of Art. 203 and art. 483 of the Code of Criminal Procedure, that when judgments were handed down in absentia, they could be appealed by *"opposition"* within 15 working days, and if the convicted person had neither domicile nor known residence, the opposition period was counted from the day of publication of the sentence in the official gazette. Similar regulations were also found in the 1936 Code of Criminal Procedure (in force from 19th March, 1936 to 31st December, 1968), in the event of the accused's unjustified absence from court, he was tried in absentia, and if the last domicile or residence was unknown or the accused was abroad, the *ordinance* containing the facts committed and the *warrant of arrest* when issued was posted at the door of the jury room and published in one of the most widely read newspapers. There was the possibility that if it was established that the accused was not on the country's territory and that this absence was not due to the fact for which he was being tried or when it would be absolutely impossible for him to appear within the time-limit specified in the ordinance issued by the President of the Court, this court could, on request, grant another time-limit (*the time-limit could be extended if it was proved that the reason for his inability to appear had not ceased*). This procedure also applied to defendants on remand, when they did not appear for trial and could not be arrested under the provisions of the Code of Procedure of that time.

After the entry into force of the Code of Criminal Procedure of 1968 (published in the Official Gazette no. 145 of 12th November, 1968), this institution was transferred to the institution of recourse, and after the 1990s, when the remedy of appeal was also introduced, the convicted person could lodge an appeal or an recourse beyond the time

limit when he had missed all the trial periods as well as the reference of the judgment, but not later than 10 days from the date, as the case may be, of the commencement of the execution of the sentence or the commencement of the execution of the civil compensation provisions (Articles 365 and 385^3 of the Code of Criminal Procedure of 1968). Also in 2010, Article 522^1 on retrial of persons tried in absentia in the event of extradition was introduced into the provisions of this Code, to the effect that, on extradition or surrender under a European arrest warrant of a person *tried and sentenced in absentia*, the case could be *retried* by the court which had tried the case at first instance, at the request of the sentenced person.

Under Law No. 302/2004 on international judicial cooperation in criminal matters (republished in the Official Gazette, Part I, no. 411 of 27th May, 2019), where an European Arrest Warrant is issued on the basis of a conviction handed down in the absence of the defendant, and where it appears from the case file that the convicted person has not been personally served with the conviction, the issuing court shall inform the executing judicial authority that:

a) within 10 days from the reception of the surrendered person in the remand and pre-trial detention centres, if applicable, the judgment of conviction shall be served on him personally in accordance with the Code of Criminal Procedure;

(b) At the time of delivery of the judgment of conviction, the surrendered person shall be informed that he is entitled, as appropriate:

- To appeal in accordance with the Code of Criminal Procedure, or
- To a retrial in accordance with the Code of Criminal Procedure.

Given the difficulties created in practice by the provisions of Article 522^1 of the Code of Criminal Procedure of 1968 and to ensure the compatibility of Romanian legislation with the standards imposed by the case law of the European Court of Human Rights, the Code of Criminal Procedure of 2010 (Law no. 135/2010, which entered into force on 1st February, 2014) introduced as a *new extraordinary remedy* of retrial - the reopening of criminal proceedings in the case of trial in absentia of the convicted person. As stated in the explanatory memorandum of the current Code of Criminal Procedure, the defendant's appearance at the trial has a particular importance both from the point of view of the defendant's right to be heard and of the need to verify the accuracy of his statements, to respect the right of defence and at the same time to give the court the opportunity, on the one hand, to form a direct impression of the defendant and, on the other hand, to listen to the statements he intends to make.

The newly introduced institution stipulated in the provisions of Articles 466 - 469 of the Criminal Procedure Code (reopening of criminal proceedings in case of trial in absentia of the convicted person) is in line with Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a person tried in absentia who has been definitively convicted must be guaranteed the right that, after conviction, the court may rule again, after hearing him on the merits of the charge in fact and in law, only if it is unequivocal that he has waived his right to be present in court and to appear or if he has not evaded the trial.

Moreover, the European Court of Human Rights recognises *the right to reopen proceedings* only if the judgment in absentia has not been the consequence of a voluntary waiver by the accused of the right to be present in court in order to prepare his defence.

Community rules on the rights of the accused person to be present in person at the trial and the right to a fair trial

The European Convention on Human Rights (signed on 4th November, 1950 in Rome and entered into force on 3rd September, 1953) establishes in Article 6 the right to a fair

and public hearing within a reasonable time by an independent and impartial court, to inform the accused promptly in a language which he understands about the nature and cause of the accusation against him, to *participate at the trial* and to be given legal assistance.

Similar provisions can be found in the Charter of Fundamental Rights of the European Union (published in the Official Journal of the European Union C326/391 of 26.10.2012), in Articles 47, 48 paragraph (2) and 53.

Subsequently, after the adoption of the Treaty on European Union (published in the Official Journal of the European Union C326/391 of 26.10.2012), it was adopted the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, to consolidate the procedural rights of persons and encouraging the application of the principle of mutual recognition to *decisions rendered in the absence of the person concerned at the trial*. This decision strengthened the procedural rights of persons who have been absent when sentenced or when a European Arrest Warrant issued for the purpose of executing a custodial sentence or measure involving deprivation of liberty has been executed; the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; the application of the principle of mutual recognition to judgments and probation decisions for the supervision of probation measures and alternative sanctions.

Thus, this framework decision strengthens the procedural rights of persons subject to criminal proceedings by laying down common rules for the recognition and/or enforcement in one Member State (*the executing Member State*) of judicial decisions rendered in another Member State (*the issuing Member State*) following proceedings at which the person concerned was not present.

In order to strengthen certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, Directive 2016/343 of the European Parliament and of the Council of 9th March, 2016 (published in the Official Journal of the European Union No L65/1 of 11th March 2016) was adopted. According to Article 8 of this Directive, it states that suspects and accused persons have the right to be present at their own trial, they must be timely informed about the trial and the consequences of non-appearance, be represented by a legal counsel authorised to represent them, and a conviction may be handed down if the accused cannot be located despite reasonable efforts to do so. The same Directive provides in Article 9 for the right to a retrial in cases where the conditions set out in Article 8 have not been met, so that the persons concerned have the right to a retrial or to another remedy which *allows the merits of the case to be re-examined*, including the examination of new evidence, and which could lead to the original decision being quashed. Through this retrial, Member States shall ensure that suspected and accused persons have the right to be present, to participate effectively, in accordance with the procedures provided for in national law, and to exercise their right of defence.

Some considerations on the institutions of criminal procedural law related to the reopening of criminal proceedings in Romania in case of trial in absentia

In Romanian procedural law, the rules of criminal procedure regulate the conduct of criminal proceedings and other judicial procedures in connection with a criminal case. There is a separation of judicial functions, namely:

- The prosecution function, where the prosecutor and the criminal investigation bodies gather the evidence necessary to establish whether or not there are grounds for arraignment;

- The function of disposing of a person's fundamental rights and freedoms during the prosecution phase, which are disposed of by the judge of rights and freedoms when they are restricted;

- The function of verifying the legality of arraignment or non-arraignment, where the preliminary chamber judge is competent;

- The trial function, which is carried out by the court in legally constituted panels.

In the first phase of the criminal proceedings, *the criminal prosecution is carried out* with the aim of gathering the necessary evidence on the existence of offenses, identifying the persons who have committed an offense and establishing their criminal liability in order to ascertain whether or not it is appropriate to order the arraignment.

When it is established that the criminal investigation material shows that the offense exists, that it was committed by the accused and that he is criminally liable, the indictment shall be issued. There may be situations in which the case is classified when the essential substantive and formal conditions of the referral have not been met or one of the cases preventing criminal proceedings exists. The accused may be *released from criminal prosecution* for certain offenses where a fine or a prison sentence of up to 7 years is provided for, if the prosecutor finds that there is no public interest.

The prosecutor's referral to the court by indictment is made to the preliminary chamber of the courts, whose purpose is to verify, after referral, the competence and legality of the referral to the court, as well as to verify the legality of the administration of evidence and the performance of acts by the prosecuting authorities. If the preliminary chamber judge finds that the conditions provided for by the law are met after the submission of the requests and exceptions, he shall order the commence of the trial by a court resolution which shall be subject to appeal within 3 days of its communication.

The third phase of the criminal proceedings follows, namely *the trial on the merits* of the criminal facts, which is subject to ordinary *appeal* within 10 days of notification of the judgment.

The decision of the court of first instance may consist either in a conviction of the defendant, or a decision to waive or defer the sentence, or in some cases a suspended sentence under supervision.

After the decision of the appeal becomes final and can be enforced, it may also be subject to extraordinary remedies, such as an *appeal for annulment* (Art. 426 lit. a of the Code of Criminal Procedure when the appeal trial took place without the legal summons of a party or when, although legally summoned, the party was unable to be present and to inform the court of this impossibility), the *appeal in cassation* provided for by Art. 434 lit. b) Criminal Procedure Code, where the decisions rejecting the request for reopening the criminal proceedings in case of trial in absentia cannot be appealed, *the review* provided for in Articles 452 - 465 Criminal Procedure Code and the *reopening of the criminal proceedings in case of trial in absentia of the convicted person* (Articles 466 - 469 Criminal Procedure Code).

Conditions to be met for the reopening of criminal proceedings in the case of a sentenced person being tried in absentia

As stated in the provisions of Article 466 paragraph 1 and 5 of the Code of Criminal Procedure, a person who has been finally sentenced and has been tried in absentia may request the reopening of the criminal proceedings *within one month* from the day on which he became aware, by any official notification, that criminal proceedings have been conducted against him.

The purpose of reopening the criminal proceedings of the person convicted in absentia is to guarantee the right to a fair trial, as provided for in Article 6 of the

European Convention for the Protection of Human Rights and Fundamental Freedoms, of the person convicted in absentia, by respecting the principles of contradiction, equality of arms, the exercise of the right of defence in person, immediateness, the right to be heard and the knowledge of the truth, and the right to examine witnesses or parties to the proceedings.

The High Court of Cassation and Justice - *The Panel for Preliminary Ruling on Questions of Law, in decision no. 22/2015* states that the notion of "*criminal proceedings*" used in the name of the extraordinary remedy of reopening the criminal proceedings in the case of trial in absentia of the convicted person means the trial phase, using the method of restrictive interpretation, the legislator seeking to ensure the possibility of resuming, under the law, the trial of the case, from the analysis of the provisions of Art. 466 paragraph 1 and 5 of the Code of Criminal Procedure, it follows that only final criminal judgments may be subject to this extraordinary procedure: *convicting decisions, decisions waiving the application of the penalty and decisions postponing the application of the penalty*, by means of the application for the reopening of the criminal proceedings it is possible to criticize only final decisions resolving the substance of the case (conviction, waiver of the application of the penalty or postponement of the application of the penalty), the person convicted in absentia being able to challenge not only the final decision handed down in his case, but also the procedure for conducting the trial in his absence, thereby infringing the principles of contradiction, immediateness, which are basic rules of the trial. This appeal differs from an *appeal for annulment* or *revision* due to the fact, in these two extraordinary remedies, the court examines whether the formal conditions for verifying the merits of the application and the grounds supporting it have been met and not the existence of the act, the commission of it by the defendant, his guilt, his criminal liability or the legal status. Moreover, Article 466 paragraph 1 Criminal Procedure Code highlights the existence of a criminal trial with a criminal action set in motion, a situation specific to a case that is tried in first instance or in appeal, and by the way of regulation, the reopening of criminal proceedings cannot be extended to all categories of proceedings (appeal for annulment, revisions, other requests), the contrary interpretation leading to the overlapping of this special procedure over other procedures (categories), also of a special nature that would jeopardize the *principle of res judicata*.

The criminal procedural provisions of Art. 466 paragraph 2 of the Code of Criminal Procedure state that this extraordinary remedy is available to the convicted person tried in absentia who was not summoned to the trial and did not otherwise officially know about it, i.e., although he was aware of the trial, he justifiably absented from the trial and could not inform the court.

The summoning of a person to appear before the criminal prosecution body or the court is done by written summons, which may also be done by telephone or telegraphic note, and a record is drawn up (Article 257 of the Code of Criminal Procedure). This summons is made to the address where the suspect, the accused or the parties to the proceedings live, but the suspect and the accused are obliged to inform the judicial body of the change of address within 3 days.

The summons may also be served on other persons who live with the *suspect* or *defendant*, and when this cannot be done, the procedural officer shall draw up a report stating the circumstances found and shall forward it to the judicial body that ordered the summons. It is very difficult to believe that in a criminal case a person tried in absentia would not have been summoned to the trial, since the judicial authorities are obliged to do so, as provided for in Article 10 of the Code of Criminal Procedure - the right to a defence or in Article 307 when the person is informed that he is a suspect or when criminal proceedings are initiated under Article 309 of the Code of Criminal Procedure.

There are other legal provisions mentioned in the Code of Criminal Procedure that there may be a situation in practice where a suspect or defendant has never been summoned in criminal proceedings. As regards the lack of any formal notification of the trial, we consider this situation plausible, but there are several situations provided for in the Code of Criminal Procedure when the suspect or defendant is informed in any other way that he has this status in criminal proceedings. We are referring to situations where the suspect or defendant participates in the carrying out of acts of criminal prosecution or is actually informed of the procedural acts carried out in the case, in the case of flagrant offenses, when the police inform him of his status as a suspect, when the criminal prosecution order is served on him or when the indictment is served on him by the preliminary chamber judge, and finally when the criminal sentence is served on him.

In the course of the trial, the irregularity with regard to the summons is taken into account only if the party missing at the court date at which the irregularity occurred, invokes it at the next deadline at which he is present or legally summoned, the provisions on the sanction of nullity applying accordingly (Article 263 paragraph 1 of the Code of Criminal Procedure). It follows from reading this text that when the defendant who had knowledge about the court date was absent with justification and could not be summoned, the court may do so at the next term with the consequence of redoing the essential documents in conditions of adversarial conditions. If the defendant has not raised these matters, he may be deprived of this right and will not be able to raise them subsequently, either in an ordinary appeal or in an extraordinary appeal such as the reopening of criminal proceedings in the case of a judgment in absentia.

The same Article 466 paragraph 2 states that a convicted person shall not be deemed to have been tried in absentia if: he has appointed a chosen defence counsel or a representative, if they have appeared at any time during the criminal proceedings; after the sentence has been communicated in accordance with the law, he has not lodged an appeal, has waived the lodging of an appeal or has withdrawn the appeal.

The same situation is when the convicted person has requested a trial in absentia during the criminal proceedings. As the case law of the European Court of Human Rights has shown, there is no longer an obligation to retry when persons who have unequivocally waived their right to be present in court and to defend themselves, and national courts have rejected requests for retrial in absentia when they have found that the defendant, during the criminal proceedings, has left the country and absconded both in the course of the proceedings and at trial, and has been represented by a defence counsel appointed by the court during the criminal proceedings. The defendants who participated in the retrial in the first instance, appealed, participated in the first trial sessions, after which they were arrested in another country and no longer participated in the trial, and those who, before the referral to the court, left the territory of Romania without being able to claim that they were tried and sentenced in absentia, were not entitled to this remedy.

Moreover, in the case law of the European Court of Human Rights in R.R. v. Italy (2005), the Court insisted that the defendant must unequivocally waive his right to be present in court in order to be able to discuss compliance with Article 6 of the Convention in the event of a conviction in absentia. It has therefore been held that a sentenced person who cannot be said to have unequivocally waived his right to be present at his or her own trial is entitled to have the proceedings reopened.

When we have a person who has been finally sentenced in absentia and a foreign state has ordered his extradition or surrender on the basis of a European Arrest Warrant, the one-month deadline for reopening the criminal proceedings runs from the date on which, after bringing him into the country, he was notified of the sentence (Article 466 paragraph 3 of the Code of Criminal Procedure).

Referral to the court for reopening of criminal proceedings

A person tried in absentia may apply for the criminal proceedings to be reopened *within one month* of the day on which he became aware, by any official notification that criminal proceedings had been instituted against him, and shall apply to the court which heard the case at first instance.

The competent court is still the first court, even if at the time the application was lodged, due to the amendment of the provisions of the criminal procedure law, it no longer had jurisdiction to hear the merits of the case at first instance.

In cases where the person tried in absentia is deprived of liberty, the application may be lodged with the administration of the place of detention, which will immediately send it to the competent court. The request must be made in writing, stating the *factual and legal grounds* for the request, both with regard to the conditions laid down in Article 466 of the Code of Criminal Procedure, which specifies the conditions for the reopening of the criminal proceedings in the case of a trial in absentia of the convicted person, and may be accompanied by copies of the documents which the person tried in absentia intends to use in the proceedings, certified as being in conformity with the original (if they are written in a foreign language, they must be accompanied by a translation) - Article 437 paragraphs (3) - (4) Code of Criminal Procedure.

It is possible that the application does not meet the conditions laid down by law and the court will then ask the applicant to *complete* the application by the first court date or, where appropriate, within a short period set by the court.

Although there is no legal provision on the right of the person to *withdraw the request for reopening of the criminal proceedings*, we consider that in this situation it is similar to the resolution of requests for postponement or interruption of the execution of the prison sentence, revision and appeal against execution, but the court must take note of this manifestation of will by a request to this effect. (See in this respect also Appeal in the interest of the law No XXXIV of 6 November 2006 - published in the Official Gazette Part I No. 368 of 30th May, 2007).

The panel that will tackle this application to reopen the criminal proceedings is composed in the same way as the panel that solved the case at first instance. According to the legal provisions, as stated in Article 64 paragraph 3 of the Code of Criminal Procedure, the judge who participated in the trial of a case may no longer participate in the retrial of the same case in an appeal or in the retrial of the case after the decision has been set aside or quashed. In the same sense, the High Court of Cassation and Justice in its Decision No. 32/2019 in which it admitted the appeal in the interest of the law (the appeal in the interest of the law ensures the interpretation and uniform application of the law by all courts), establishing that: "*the judge who participated in the trial of a case may not participate in the trial of the same case in an extraordinary appeal (among which is also the reopening of the criminal proceedings in the case of the trial in default of the convicted person), at the stage of admissibility in principle (appeal for annulment, revision and appeal in cassation)*".

Prior to the hearing of the request for reopening the trial, the court must take some *preliminary measures* provided for in Article 468 of the Criminal Procedure Code, in the sense that upon receipt of the request for reopening the trial, a time limit is set for the examination of *admissibility in principle*, and the president orders the attachment of the case file, as well as the summoning of the parties and the main parties involved in the proceedings. If the person requesting the reopening of the criminal proceedings is deprived of liberty, even in another case, it is mandatory to inform him of the deadline and to make arrangements for his defence with a public defender, ensuring the presence of the person deprived of liberty at the hearing of the request for reopening of the proceedings.

In the *admissibility phase*, the court listens to the prosecutor's conclusions, the parties and the main parties and examines whether (Art. 469 letters a - c of the Criminal Procedure Code): the request was made in due time and by the convicted person, fulfilling the conditions of Art. 466 of the Criminal Procedure Code; the legal grounds for reopening the criminal proceedings have been invoked and the grounds on which the request is based have not been presented in a previous request for reopening the criminal proceedings which was finally judged. Such requests shall be examined as a matter of *urgency*, and if the sentenced person is serving the prison sentence imposed in the case for which retrial is requested, the court may *suspend the execution of the judgment*, in whole or in part, and may order the sentenced person to comply with one of the obligations provided for in Article 215 paragraphs (1) and (2) of the Criminal Code relating to judicial supervision. As the legislator intended, it is clear that this reasoned suspension of the enforcement decision is made at this stage of the admission in principle, because when the request to reopen the criminal proceedings is granted, art. 469 paragraph 7 of the Code of Criminal Procedure, the judgment handed down in the absence of the convicted person is automatically annulled and it would be illusory to provide for the suspension of a judgment of conviction as long as it no longer exists. In cases where enforcement of the imprisonment sentence has not begun, the court may order the preventive measure of judicial supervision with the fulfilment of one or more obligations.

Once it is established that the conditions of 469 paragraph 1 are fulfilled, a resolution shall be issued granting the request for reopening the criminal proceedings, in accordance with Article 469 paragraph (3) Code of Criminal Procedure.

With regard to this reopening, the High Court of Cassation and Justice, in its decision no. 13 of 3rd July, 2017, which ruled on an *appeal in the interest of the law* (decision binding upon publication in the Official Gazette), held that the admission of the request to reopen the criminal proceedings entails the automatic annulment of the judgment of conviction with the consequence of resuming the trial before the first instance court. The overrule of the judgment of conviction does not allow access to the pre-trial phase, which was definitively closed by a previous and separate judgment, which cannot be censured in a subsequent or subsequent procedural phase. This solution results from the application of the principle of the separation of judicial functions in criminal proceedings (Article 3 of the Code of Criminal Procedure), the function of verifying the legality of the committal for trial being distinct from the trial function and completed by a judgment which does not prejudge the outcome of the criminal proceedings and, as a result, there is no reason to extend to it the effects of the overruling in the procedure for reopening the criminal trial.

Given that the decision on the appeal in the interest of the law referred to above was binding on the courts, the Constitutional Court was seized of the exception of unconstitutionality of the provisions of Article 469 para. 3 in a case concerning the resolution of the request for reopening of the criminal proceedings, in the sense that after the request for reopening of the criminal proceedings has been admitted, according to the Decision no. 13/2017, the file cannot be assigned to the preliminary chamber judge but only to the court. The Constitutional Court by Decision No 590/2019 (published in the Official Gazette, Part I, No 1019 of 18 December 2019) stated that the resumption of the case from the first instance trial phase, on the occasion of the reopening of the criminal proceedings, under Article 469 of the Code of Criminal Procedure, as decided by Decision No. 13/2017 issued by the High Court of Cassation and Justice, and not from the *pre-trial chamber phase*, in the hypothesis where the defendant was not legally present at the aforementioned procedural stage or, although aware of the trial, justifiably missed the trial, violates the right to a fair trial and the

right to defence of the person in the hypothesis analyzed, who was convicted in absentia.

The Constitutional Court found that the provisions of Article 469 paragraph 3 of the Code of Criminal Procedure, as interpreted by Decision No. 13/2017 violates the provisions of Art. 21 paragraph 3 and Art. 24 of the Constitution, Art. 6 of the European Convention on Human Rights, creating a discrimination between persons tried in absentia, in respect of whom the reopening of the criminal proceedings is ordered, according to Art. 469 of the Code of Criminal Procedure, but who were not legally summoned and, therefore, did not have the opportunity to participate in the preliminary proceedings, and those who participate in all stages of the criminal proceedings, declaring unconstitutional this article.

Decisions given by the competent court on the application to reopen the criminal proceedings

After the admission in principle, the court may order by *resolution* either the admission of the request for reopening of the criminal proceedings, which has the effect of automatically dismissing the judgment rendered in the absence of the convicted person, or, if it finds that the conditions provided for in Article 466 of the Code of Criminal Procedure have not been met, it may order by *sentence* the dismissal of the request for reopening of the criminal proceedings (Article 469 paragraphs 3 - 4 of the Code of Criminal Procedure).

Admitting the request leads to the resumption of the case in the *first instance* trial phase (it also applies to the preliminary chamber phase if the person was justifiably absent from the trial and could not meet the court - according to the decision of the Constitutional Court no. 590/2019).

The legislator has envisaged in the provisions of Article 469 paragraph 5 and 6 of the Code of Criminal Procedure that the *resolution* by which is admitted the request for reopening the criminal proceedings may be appealed together with the merits, and the *decision* rejecting the request for reopening the criminal proceedings is subject to the same appeal as the decision rendered in the absence of the convicted person, i.e. the appeal.

It is possible for the person convicted in absentia to either waive the appeal or to withdraw the appeal, which requires a positive expression of will by making an express declaration to that effect. If, in the case of a person convicted in absentia, more than one person has been investigated and tried, the legislator has provided in the provisions of Article 469 paragraph 8 of the Code of Criminal Procedure that the reopening of the criminal proceedings may be extended to the parties who have not made a request, and may also decide on them without creating a more difficult situation for them.

It follows from this legal provision that not only the parties who have not made a request will not be made worse off by the request for reopening, but even the holder of the request for reopening of the criminal proceedings cannot be given a harsher sentence than the one previously imposed by the default judgment.

Moreover, it should also be mentioned that the extension with regard to the parties who did not make the request must also meet the conditions set out in Article 466 for the reopening of the criminal proceedings in the case of a trial in absentia of the convicted person and not for those who were present at the outcome and sentencing in the criminal proceedings.

Once the request for reopening of the criminal proceedings has been granted, the court, ex officio or at the request of the prosecutor, may order to be taken against the accused one of the measures referred to in Article 202 paragraph (4) letter b) - e) on judicial supervision; judicial supervision on bail; home detention or pre-trial detention.

After the application for reopening of the criminal proceedings of the person tried in absentia is granted, the trial is resumed in the first instance from the preliminary chamber stage, and the trial is conducted in accordance with the trial provisions of Articles 371 - 425 of the Code of Criminal Procedure.

References

Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Union C326/391 of 26.10.2012.

Code of Criminal Procedure of 1968, published in the Official Gazette No. 145 of 12th November, 1968.

Constitutional Court - Decision No. 590/2019, published in the Official Gazette Part I No. 1019 of 18th December, 2019.

Criminal Procedure Code of 2010, published in the Official Gazette, Part I, No. 486 of 15th July, 2010.

EU Directive 2016/343 of the European Parliament and of the Council of 9th March 2016, published in the Official Journal of the European Union No. L65/1 of 11 March, 2016.

High Court of Cassation and Justice - Appeal in the interest of the law No XXXIV of 6th November 2006, published in the Official Gazette Part I No. 368 of 30th May, 2007.

High Court of Cassation and Justice - Appeal in the interest of the law No. 13/2017, published in the Official Gazette Part I No 735 of 13 September 2017.

High Court of Cassation and Justice – The Panel for Preliminary Ruling on Questions of Law in Decision No. 22/2015, published in the Official Journal No 486 of 2nd July, 2015.

Law No. 302/2004 on international judicial cooperation in criminal matters, republished in the Official Gazette, Part I, No. 411 of 27th May, 2019.

Treaty on European Union, published in Official Journal of the European Union C326/391 of 26.10.2012.